



OHIO VALLEY ELECTRIC CORPORATION
INDIANA-KENTUCKY ELECTRIC CORPORATION
3932 U. S. Route 23
P. O. Box 468
Piketon, Ohio 45661
740-289-7200

WRITER'S DIRECT DIAL NO:
740-289-7299

May 28, 2021

VIA ELECTRONIC MAIL

Mr. Steven Thill, Chief
Permits Branch
Office of Land Quality
Indiana Department of Environmental Management
100 North Senate Avenue
MC 65-45 IGCN 1101
Indianapolis, IN 46204-2251
sthill@idem.in.gov

Re: IKEC Evaluation of Indiana CCR Permitting Authority

Dear Mr. Thill:

The Indiana-Kentucky Electric Corporation (IKEC) supports Public Law 100-2021 and the idea that the Indiana Department of Environmental Management (IDEM) should seek approval from U.S. EPA to administer the federal Coal Combustion Residuals (CCR) program in Indiana through a state permit program. IDEM already regulates our Clifty Creek Station through air and water permits that also implement federal requirements. IKEC has a good working relationship with IDEM and recognizes that the permit writers are familiar with Clifty Creek Station and its site-specific concerns. However, IKEC continues to have concerns with IDEM's approach to CCR regulation in Indiana in advance of such U.S. EPA approval.

IKEC has evaluated the Indiana Administrative Code, the rulemaking history surrounding the IDEM's incorporation by reference of the federal CCR Rule as it applies to surface impoundments, and the finalization of Senate Bill 271, which is now Public Law 100-2021. IKEC has concluded that Public Law 100-2021 solidifies IKEC's position - as noted in our comments on IDEM's draft Permit for the Phase I closure of the Clifty Creek Station West Boiler Slag Pond (WBSP) - that Indiana has not yet applied for, let alone received, Water Infrastructure for Improvements to the Nation (WIIN) Act approval from the United States Environmental Protection Agency (U.S. EPA) to issue permits for CCR units. As a result, IKEC does not believe IDEM has authority to regulate CCR surface impoundments through permit conditions at this time.

IKEC recently received its final Permit for the Phase I closure of the WBSP. Unfortunately, the issues IKEC identified in its comments on the draft permit concerning

IDEM's imposition of requirements for CCR surface impoundments that go beyond the federal rule requirements remain unaddressed. IKEC plans to appeal the final Permit to the Indiana Office of Environmental Adjudication in order to preserve our legal rights to challenge these issues; however, IKEC prefers to continue to try to work with IDEM to resolve these issues and obtain a revised permit that is consistent with the federal CCR rule.

Background

IKEC must close the Clifty Creek Station WBSF in accordance with the federal CCR Rule. Because IDEM informed IKEC that it believes a state-issued permit from the Office of Land Quality is required for closure of this pond, IKEC began working with IDEM in April 2019 in order to secure such a permit. In the course of these permit discussions, IKEC has noted numerous concerns with IDEM's approach to the state permit. IKEC has identified multiple requirements within the permit for Phase I of the WBSF closure that exceed IDEM's authority with respect to the federal CCR Rule and impose conflicting obligations on IKEC, potentially requiring IKEC to choose between non-compliance with the federal CCR Rule or IDEM's permit requirements. These concerns were shared with IDEM in written comments, as well as via telephone conversations between IKEC and IDEM staff.

As you are aware, IKEC, similar to other utilities subject to CCR Rule, Part A requirements, is attempting to comply with U.S. EPA's requirement to initiate closure of unlined surface impoundments "as soon as technically feasible". As part of its compliance strategy, IKEC submitted a request to U.S. EPA that demonstrated IKEC's need for an alternative compliance deadline for closure of the WBSF, as well as the Clifty Creek Station's Landfill Runoff Collection Pond (LRCP), which is an inactive CCR surface impoundment. That demonstration, which was submitted in compliance with the CCR Rule's deadline of November 30, 2020, included a schedule that would enable IKEC to achieve closure of the WBSF and LRCP "as soon as technically feasible," and assumed that IDEM approval of its closure plan would be timely.

However, IKEC has been delayed by IDEM's permitting process and the ongoing discussions with IDEM surrounding IDEM's untenable position that it has authority to impose permit conditions for CCR surface impoundment closures that differ from the federal CCR rule. IDEM incorporated the CCR Rule (40 CFR 257.50 through 40 CFR 257.107) into the state code by reference only (see 329 IAC 10-9-1-(9)(b) and (c)), following a shortened rulemaking process. Indiana case law recognizes that the effect of incorporation by reference is as if the incorporated material had been "written into" the law adopting that material and thus would provide IDEM no authority to go beyond the language of the federal rule.

IDEM's incorporation of the CCR Rule by reference cannot change the rule's requirements or give IDEM new authority.

Indiana law requires IDEM to follow a specific process to adopt rules that impose requirements that are more stringent than federal law. Ind. Code § 13-14-9-4(c).

IDEM did not follow that process when incorporating the CCR Rule for surface impoundments. Indiana law also allows for a shortened rulemaking process for

incorporation of federal laws that “contain no amendments that have a substantive effect on the scope or intended application of the federal law or rule”. Ind. Code § 13-14-9-8(a)(1)(A)(ii). IDEM followed this shortened rulemaking process when incorporating the CCR Rule for surface impoundments. Therefore, as a matter of law, because Indiana incorporated the CCR Rule using the shortened rulemaking process, the Indiana rule cannot substantively differ in “scope or intended application” from the federal law - meaning IDEM cannot rely on 329 IAC 10-9-1 to impose requirements that differ from or are more stringent than the federal CCR Rule.

Further, during the rulemaking to incorporate the CCR Rule by reference, IDEM made multiple public statements indicating it would implement the CCR Rule *as written*. IDEM indicated that the incorporation by reference was intended to allow IDEM to approve alternative compliance deadlines and to enforce the CCR Rule without resorting to the citizen suit enforcement mechanism. A small selection of IDEM’s statements are as follows:

- “At 329 IAC 10-3-1, we made some changes to inclusions (8) and (9), and basically this is to just make it clear that besides what is included in 329 IAC 10-9-1, which is basically 40 CFR 257, that the CCR impoundments will only be subject to those standards [part 257] as opposed to 329 IAC 10 ... as a whole. We thought that this language more clearly presented to the public as well as interested stakeholders that those had been our intentions all long ... ” ERB, Transcript of Public Meeting, at 41–42 (Aug. 10, 2016) (adoption of the Rule)(emphasis added) ([link](#)).
- “The federal rule is self-implementing and is designed to only be enforced through citizens’ suits, but the rule allows states to amend their own solid waste management plans in order to grant and enforce compliance schedules for federal deadlines.” ERB, Transcript of Public Meeting, at 41–42 (Feb. 10, 2016) (adoption of the first emergency rule) (emphasis added) ([link](#)).
- “IDEM was contacted by interested stakeholders who requested that IDEM explore the possibility of approving alternative compliance schedules to the compliance deadlines associated with 40 CFR 257, Subpart D, that are allowable if approved by U.S. EPA as part of a state’s Solid Waste Management Plan (SWMP) in accordance with 40 CFR 256.” IDEM, Rule Information Sheet, at 1 (Aug. 10, 2016) (adoption of the Rule) (emphasis added) ([link](#)).

We have included a list of some additional IDEM statements as Attachment A to this letter.

To the extent IDEM now uses the incorporation by reference as authority for permit conditions that differ from the federal CCR Rule, the original rulemaking is void because that rulemaking did not follow the required rulemaking procedures for adding such substantive requirements and it did not give the public fair notice as to the content of the rules.

IKEC has highlighted in its comments to IDEM various points in which IDEM’s WBSP Phase 1 closure approval veers from federal CCR Rule requirements. In most instances, those permit conditions displace the self-implementing nature of the CCR Rule, which is not permissible under Indiana Law or under Federal Law without first securing approval

from U.S. EPA pursuant to the WIIN Act to act as the permitting and enforcement authority. One specific example of how IDEM permit conditions go beyond the CCR Rule is IDEM's repeated inclusion of language that substitutes IDEM approval for that of the facility's qualified professional engineer (QPE), whose certification the self-implementing CCR Rule requires. Nowhere in the rulemaking to incorporate the CCR Rule by reference did IDEM indicate it would change the rules' requirements to substitute IDEM approval for QPE certification. The approval IDEM received to incorporate the CCR Rule *verbatim* by reference did not provide the agency with the authority to develop new oversight and approval authority that is a hybridization of the federal CCR Rule's requirements with state program requirements from Indiana's restricted waste sites rules, municipal waste rules, and other miscellaneous state rules. Similarly, incorporating the CCR Rule by reference did not give agency staff the ability to use state closure permits for CCR surface impoundments to revisit and alter, on a case-by-case basis, any aspect of the federal rules that U.S. EPA had already deemed protective of human health and the environment. IDEM's attempts to impose new requirements in IKEC's permit that do not appear in the federal CCR Rule are completely outside the scope of IDEM's authority under the state rules (and its commitments) as they were promulgated.

IDEM has failed to meet the requirements of U.S. EPA's conditional approval of the IDEM CCR Solid Waste Management Plan.

The U.S. EPA's March 2017 conditional approval of IDEM's incorporation of the CCR Rule into IDEM's Solid Waste Management Plan was dependent upon IDEM "updating its land disposal regulations to be consistent with the technical requirements at 40 CFR 257, Subpart D". It was never meant to give IDEM authority over a CCR permit program. IDEM clearly stated in its submittal to U.S. EPA that IDEM would need to adopt additional rules, and seek U.S. EPA approval of those rules, before it would have permitting authority under the WIIN Act.¹ Rather, the approval from U.S. EPA was intended solely to ensure that "Indiana is authorized to establish compliance schedules" for any units containing CCR that would otherwise be considered "open dumps" as a result of the CCR Rule, thereby preventing the hardships that would result from the prohibition on operating such units. As IDEM explained,

Before February 12, 2016, Indiana's solid waste land disposal facility regulations in 329 IAC 10 excluded CCR impoundments from the requirements of the regulations. This had the effect that a CCR impoundment could not be classified as an open dump under Indiana's regulations. To remedy this issue, IDEM modified the exclusions and incorporated by reference provisions of the CCR Rule which apply to CCR impoundments. This enables Indiana to classify CCR impoundments that

¹ U.S. EPA's review of IDEM's plan submittal stated: "As described in the final CCR SWMP, IDEM will update Indiana's land disposal facility regulations to ensure consistency with the federal CCR rule by December 2018. Until the rulemaking process is completed, Indiana will implement the CCR rule *for landfills* through existing laws, regulations and permitting authorities. Indiana will implement the CCR rule *for surface impoundments* by incorporating the federal requirements by reference under a temporary measure which will be replaced by the updated land disposal facility regulations. Once the land disposal facility regulations are updated, IDEM will seek permitting program approval, as provided by Section 2301 of the Water and Waste Act of 2016. At that time, EPA will conduct a side-by-side comparison of the State's CCR technical requirements with the federal CCR regulations." Part 256 Evaluation of Indiana SWMP, page 1 (emphasis added).

are not in compliance with the federal provisions as open dumps and to use State authorities to enforcement those provisions under IC 13-30. The modified exclusions and incorporation by reference will eventually be replaced or supplemented to establish a complete set of Indiana regulations for CCR impoundments, as discussed in Section 3 of this plan.

IDEM CCR SWMP Amendment, page 5.

As part of its review, EPA evaluated each aspect of IDEM's SWMP to ensure it met the requirements of federal law. When comparing IDEM's SWMP to 40 CFR §265.20, which requires the "State plan shall assure that the State has adequate legal authority to prohibit the establishment of new open dumps and to close or upgrade existing open dumps," EPA noted that:

Section 2 describes IDEM's interim approach to ensure the legal authority to regulate the CCR universe is comparable with the federal standards. For [surface impoundments], IDEM adopted an emergency rule, effective February 12, 2016, that incorporated by reference the federal requirements for CCR surface impoundments. This rule enables IDEM to classify surface impoundments, which are not in compliance with the federal rule, as open dumps and then use the State authorities to enforce the provisions.

Part 256 Evaluation of Indiana SWMP, page 6.

U. S. EPA's conditional approval was thus limited in scope and was explicitly conditioned on IDEM's adoption of state regulations that are consistent with federal requirements. IDEM's plan made this clear:

Within 180 days after final adoption, IDEM proposes to submit to EPA the final CCR-related rules ... as evidence of a permit program for regulation by IDEM of coal combustion residuals units in Indiana. As contemplated by section 2301 of the Water and Waste Act of 2016 [a part of the WIIN Act], after approval by the EPA Administrator, IDEM's permit program will operate in lieu of regulation of coal combustion residuals units in Indiana under Federal regulations or a permit program implemented by the EPA Administrator. As of the writing of this plan, EPA has not indicated the requirements for requesting approval of a CCR permit program. IDEM intends to submit any additional information that may be required to establish a State program for control of coal combustion residuals under section 4005(d) of the Solid Waste Disposal Act (42 U.S.C. 6945).

IDEM CCR SWMP Amendment, page 7. (emphasis added)

In 2017, IDEM recognized that it could not regulate surface impoundments by permit until "after approval by the EPA Administrator" of the yet to be promulgated state permit program rules. IDEM further recognized that U.S. EPA had not yet established a mechanism for even seeking such approval. Thus, there is no way U.S. EPA's conditional approval of IDEM's incorporation of the CCR Rule by reference could be viewed as constituting approval for IDEM to create new requirements for surface impoundments via permits. And despite Indiana's commitment to U.S. EPA to finalize revisions to the State's

regulations by December 2018 to create such a state permit program, to date, no revisions have been made and Indiana has not adopted state regulations that are consistent with the federal requirements. In fact, IDEM failed to meet any of the deadlines it proposed in its 2017 Solid Waste Management Plan that formed the basis for its conditional approval:

- First Notice of public comment period
 - Due: September 3, 2017
 - Actual: December 6, 2017
- Stakeholder engagement and rule drafting
 - Due: 1st Quarter 2017 to April 2018
 - Status: Not Started
- Draft to EPA for comment
 - Due: April 2018
 - Status: Not Started
- Second Notice of public comment period
 - Due: May 2018
 - Status: Not Started
- Environmental Rules Board preliminary adoption
 - Due: June 2018
 - Status: Not Started
- Environmental Rules Board final adoption
 - Due: September 2018
 - Status: Not Started
- Attorney General and Governor review
 - Due: October 2018
 - Status: Not Started
- Publication in Indiana Register
 - Due: November 2018
 - Status: Not started
- Rules effective
 - Due: December 2018
 - Status: Not Started

In light of IDEM's failure to meet the conditions of U.S. EPA's conditional approval of IDEM's Solid Waste Management Plan Amendment, it is questionable whether that approval remains valid and whether IDEM has any authority to write closure approvals for CCR surface impoundments.

Public Law 100-2021 expressly prohibits IDEM from imposing requirements on IKEC's CCR Units until IDEM has WIIN Act approval.

Public Law 100-2021, enacted this spring, eliminates any doubts as to IDEM's purported authority to implement the federal CCR rule. Public Law 100-2021 clearly aligns Indiana's authority with the provisions of the WIIN Act, which created a framework for states to seek approval to administer a state permit program for CCR units that will, "after approval by the Administrator" operate in lieu of the CCR Rule. Specifically, Public Law 100-2021 § 9 (to be codified at Ind. Code 13-19-3-3(g)) states:

The state permit program established under this section must not establish requirements for any surface impoundment of coal combustion residuals unless and until the state permit program is approved by the administrator of the United States Environmental Protection Agency under 42 U.S.C. 6945(d)(1). (emphasis added)

The language contained in Public Law 100-2021 is consistent with the CCR Rule and the WIIN Act and makes it clear that IDEM does not have the authority to administer the CCR Rule or change it from a self-implementing rule to an agency-implementing rule without an EPA-approved permit program. IDEM received clear direction from the legislature requiring it establish a State Permit Program pursuant to Public Law 100-2021 - and to notify U.S. EPA of its intent to do by May 15, 2021. Amended Ind. Code 13-19-3-3 specifically provides:

(e) Not later than May 15, 2021, the department shall notify the United States Environmental Protection Agency of its intention to establish a state permit program described in subsection(d)(1) and to seek approval of the state permit program under 42 U.S.C. 6945(d)(1).

(f) Under IC 4-22-2 and IC 13-14-9:

(1) the department shall initiate rulemaking for the establishment of the state permit program not more than sixty (60) days after the effective date of the SECTION of Senate Enrolled Act 271-2021 amending this section...

Currently, IKEC does not know whether IDEM complied with Public Law 100-2021 and provided U.S. EPA with notification by May 15, 2021 of its intent to develop a state permit program pursuant to subparagraph (e), above. IDEM must also begin the rulemaking process to develop a state permit program by June 21, 2021. Until that permit program is adopted by IDEM and approved by U.S. EPA, the federal CCR rule remains the applicable law and addresses both operating requirements and closure requirements. Thus, Public Law 100-2021 leaves no doubt that IDEM is not to impose any requirements

for operation or closure of a CCR surface impoundment “unless and until the state permit program is approved” by U. S. EPA.²

Based on IKEC’s review and interpretation of the existing federal CCR Rule, the WIIN Act, and existing Indiana regulations and authority as they relate to CCR surface impoundments, IKEC asserts that certification of a CCR surface impoundment’s closure design and completion falls to the facility’s QPE as described in the federal CCR Rule, and that approval from IDEM is not currently required to initiate closure activities of any

² As further support for IKEC’s position that IDEM does not have jurisdiction to impose requirements on the WBSP that exceed the CCR Rule, IKEC notes that according to IDEM, “IDEM’s solid waste program does not regulate coal ash surface impoundments that are subject to a National Pollutant Discharge Elimination System (NPDES) permit.” IDEM, CCR (Coal Ash) Fact Sheet, *available at* https://www.in.gov/idem/files/factsheet_olq_permits_ccr.pdf. IKEC is not terminating the NPDES permit associated with the facility at this time. In fact, in a separate permit proceeding, IKEC is seeking IDEM approval for all system modifications necessary to concurrently comply with the federal Effluent Limitation Guidelines Rule.

surface impoundment subject to the federal CCR rule, or to perform any of the other compliance activities required by the CCR Rule (e.g. groundwater monitoring activities, inspections, performing various evaluations, or selecting site-specific remedies).

Conclusion

While IDEM does not appear to have authority to administer a CCR permit program, IKEC always seeks to work cooperatively with IDEM and, nevertheless sought a permit from IDEM. Based on the foregoing, and in order to comply with the federal CCR Rule requirement to initiate closure of its surface impoundments "as soon as technically feasible", as represented in the schedule contained in the request for an alternative CCR Rule Part A compliance deadline submitted to U.S. EPA in November 2020, IKEC has determined it is imperative to initiate closure activities. IKEC will continue to rely on the self-implementing CCR Rule for governance of the closure activities and post-closure activities where the requirements of the CCR rule differ from those contained in the Phase I closure permit issued by IDEM.

IKEC would be happy to discuss these issues with IDEM at any time that is convenient in hopes of resolving these issues. However, given that IKEC cannot accept a permit that requires it to choose between being in noncompliance with either federal law or state law, IKEC will be forced to raise these issues on appeal as detailed in IKEC's Petition for Adjudicatory Hearing and Administrative Review and Request for Stay scheduled to be filed by June 1, 2021 since middle ground has not yet been achieved.

If you have any questions, please contact me via email at mbrown@ovec.com or phone (740) 289-7299, or contact Gabe Coriell at gcoriell@ovec.com or (740) 708-3047.

Sincerely,



J. Michael Brown
Environmental, Safety & Health Director

JMB:klr

CC: Nancy King, IDEM, nking@idem.in.gov
Peggy Dorsey, IDEM, pdorsey@idem.in.gov
Richard Huggins, U.S. EPA, Huggins.Richard@epa.gov

Attachment A

IDEM Statements on the Purpose of the State-Level CCR Incorporation by Reference

- IDEM has elected to do this rulemaking so that it may reconcile the dual layer of regulation and be the enforcing authority of the standards for CCR impoundments. IDEM, Rule Information Sheet, at 1 (Fed. 10, 2016) (adoption of the first emergency rule).
- IDEM was contacted by interested stakeholders who requested that IDEM explore the possibility of approving alternative compliance schedules to the compliance deadlines associated with 40 CFR 257, Subpart D. IDEM, Rule Information Sheet, at 1 (Fed. 10, 2016) (adoption of the first emergency rule).
- The federal rule is self-implementing and is designed to only be enforced through citizens' suits, but the rule allows states to amend their own solid waste management plans in order to grant and enforce compliance schedules for federal deadlines. ERB Transcript, at 41–42 (Feb. 10, 2016) (adoption of the first emergency rule).
- By incorporating this regulation by reference, the department will have the authority to ensure compliance and take enforcement action if necessary to ensure protection to human health and the environment. ERB Transcript, at 44–45 (Feb. 10, 2016) (adoption of the first emergency rule).
- So, we intend to just go ahead and adopt what the federal regulations are dictating for CCR impoundments. We just want to put ourselves in a position to be the enforcement agency. ERB Transcript, at 47 (Feb. 10, 2016) (adoption of the first emergency rule).
- The [Solid Waste Management Plan] simply lays out the agency's -- or the state's intent to develop that program. It itself does not establish any requirement. The agency would still have to go through the standard rule-writing process with affected stakeholders and bring a rule to the Board for consideration before we would implement any program. ERB Transcript, at 51 (Feb. 10, 2016) (adoption of the first emergency rule).
- IDEM was contacted by interested stakeholders who requested that IDEM explore the possibility of approving alternative compliance schedules to the compliance deadlines associated with 40 CFR 257, Subpart D. IDEM, Rule Information Sheet, at 1 (May 11, 2016) (adoption of the second emergency rule).
- This emergency rule excludes the CCR impoundments from the solid waste landfill regulations of 329 IAC 10 and incorporates the federal regulations found at 40 CFR 257.50 through 40 CFR 257 .106 into Indiana rules to regulate CCR impoundments. IDEM is currently working on an amendment of Indiana's SWMP for submission to the U.S. EPA for approval so that IDEM can approve alternative compliance schedules under 40 CFR 256. This allows IDEM to be the enforcing authority for the regulation of CCR impoundments. IDEM, Rule Information Sheet, at 1 (May 11, 2016) (adoption of the second emergency rule).
- IDEM has elected to do this rulemaking so that it may be the enforcing authority of the standards for CCR impoundments. IDEM, Rule Information Sheet, at 2 (May 11, 2016) (adoption of the second emergency rule).

- Indiana needs to be able to show that they can enforce standards that are as stringent as the federal regulations. ERB Transcript, at 28 (May 11, 2016) (adoption of the second emergency rule).
- The regulations are self-implementing, but contain strict compliance deadlines. A CCR impoundment must meet operating criteria within six months of the effective date of the rule, or by April 19, 2016, or close within 18 months of the effective date of the rule, or by April 19, 2017. *Section 8 Notice*, at 1.
- Because the federal regulations are self-implementing, there is no regulatory agency providing compliance and enforcement oversight. By incorporating these regulations by reference into Indiana law, IDEM will have the authority to ensure compliance and take enforcement action if necessary to ensure protection of human health and the environment. *Section 8 Notice*, at 2.
- IDEM was contacted by interested stakeholders who requested that IDEM explore the possibility of approving alternatives to the compliance deadlines associated with 40 CFR 257, Subpart D. *Section 8 Notice*, at 2.
- No element of the draft rule imposes either a restriction or a requirement on persons to whom the draft rule applies that is not imposed under federal law. This draft rule imposes no restrictions or requirements because it is a direct adoption of federal requirements that are applicable to Indiana and contains no amendments that have a substantive effect on the scope or application of the federal rule. *Section 8 Notice*, at 2.
- This rule will not impose any requirements on regulated entities beyond what is imposed under federal law and regulation. *Section 8 Notice*, at 2.
- This rule is the direct adoption of federal requirements that are applicable to Indiana and it contains no amendments that have a substantive effect on the scope or intended application of the federal rule. *Section 8 Notice*, at 3.
- If Indiana wishes to obtain U.S. EPA approval of an amendment to Indiana's SWMP that would enable IDEM to issue and enforce alternate compliance schedules for CCR impoundments in accordance with 40 CFR 256, Indiana is required by federal law to adopt rules at least as stringent as 40 CFR 257, Subpart D. *Section 8 Notice*, at 3.
- The environment and persons regulated or otherwise affected by the proposed rule will benefit from prompt adoption of this rule, because it will allow IDEM to pursue U.S. EPA approval of an amendment to Indiana's SWMP so that IDEM can approve alternative compliance schedules for the operation and closure of CCR impoundments. *Section 8 Notice*, at 3.
- This rulemaking will provide IDEM with the authority to ensure compliance with the federal requirements of 40 CFR 257.50 through 40 CFR 257.106, concerning CCR surface impoundments, and take enforcement action, if necessary, to ensure protection to human health and the environment. Summary/Response to Comments from the IC 13-14-9-8 Comment Period, at 1 (Aug. 10, 2016) ("Response to Comments").
- IDEM was contacted by interested stakeholders who requested that IDEM explore the possibility of approving alternative compliance schedules to the compliance deadlines associated with 40 CFR 257, Subpart D, that are allowable if approved by U.S. EPA

as part of a state's Solid Waste Management Plan (SWMP) in accordance with 40 CFR 256. IDEM, Rule Information Sheet, at 1 (Aug. 10, 2016) (adoption of third emergency rule).

- This rulemaking removes exemptions for CCR impoundments from the solid waste landfill regulations of 329 IAC 10 and incorporates the federal regulations found at 40 CFR 257.50 through 40 CFR 257.106 into Indiana rules to regulate CCR impoundments. IDEM, Rule Information Sheet, at 1 (Aug. 10, 2016) (adoption of third emergency rule).
- IDEM has elected to do this rulemaking so that it may be the enforcing authority of the standards for CCR impoundments. IDEM, Rule Information Sheet, at 2 (Aug. 10, 2016) (adoption of third emergency rule).
- IDEM was contacted by interested stakeholders who requested that IDEM explore the possibility of approving alternative compliance schedules to the compliance deadlines associated with 40 CFR 257, Subpart D, that are allowable if approved by U.S. EPA as part of a state's Solid Waste Management Plan (SWMP) in accordance with 40 CFR 256. IDEM, Rule Information Sheet, at 1 (Aug. 10, 2016) (adoption of the Rule).
- This rulemaking removes exemptions for CCR impoundments from the solid waste landfill regulations of 329 IAC 10 and incorporates the federal regulations found at 40 CFR 257.50 through 40 CFR 257.106 into Indiana rules to regulate CCR impoundments. IDEM, Rule Information Sheet, at 1 (Aug. 10, 2016) (adoption of the Rule).
- IDEM has elected to do this rulemaking so that it may be the enforcing authority of the standards for CCR impoundments. IDEM, Rule Information Sheet, at 2 (Aug. 10, 2016) (adoption of the Rule).
- At 329 IAC 10-3-1, we made some changes to inclusions (8) and (9), and basically this is to just make it clear that besides what is included in 329 IAC 10-9-1, which is basically 40 CFR 257, that the CCR impoundments will only be subject to those standards as opposed to 329 IAC 10-9 as -- or 10 as a whole. We thought that this language more clearly presented to the public as well as interested stakeholders that those had been our intentions all long, so we just wanted to make sure that the language was as clear as (sic) possible, so we made that slight change. ERB Transcript, at 41–42 (Aug. 10, 2016) (adoption of the Rule).
- The emergency rule and the amendments you adopted today allow us in the very immediate term to enforce the federal requirements for CCR impoundments, and that's distinct from landfills that are also regulated by the federal rule, which are not the subject of the two rules you passed today. They allow us to enforce those requirements, and that positions the agency then to be able to entertain variances and compliance schedules to assist the utilities that are having trouble with certain deadlines in the federal requirements. ERB Transcript, at 60–61 (Aug. 10, 2016) (adoption of the Rule).
- The prospect of undertaking the full comprehensive update to the land disposal regulations to blend existing landfill rules together with the federal criteria is really a project that involves a lot of stakeholders and it's a complex project, and not one that can be completed in such a short amount of time. So, that's the reason we proceeded the way we did in this case, and we look forward to working with stakeholders in the

future on the more comprehensive project. ERB Transcript, at 61 (Aug. 10, 2016) (adoption of the Rule).

- Interested stakeholders asked IDEM to amend the Solid Waste Management Plan to incorporate subpart (d) in order to work more directly with them on such things as compliance schedules. ERB Summary, at 3 (Nov. 9, 2016) (adoption of the Rule).
- Jeff Sewell, Branch Chief, OLQ Permits, said the emergency rule and amendments adopted at this meeting allow IDEM to enforce the federal requirements for CCR impoundments, variances and compliance schedules. ERB Summary, at 4 (Nov. 9, 2016) (adoption of the Rule).
- IDEM will use existing regulations and authorities for CCR landfills and has incorporated the CCR Rule provisions for surface impoundments by reference to Indiana law as an interim and temporary step in regulating CCR facilities until a full update to Indiana's regulations can be completed. IDEM, Indiana Coal Combustion Residuals Part 256 Solid Waste Management Plan Amendment, at 2 (Feb. 23, 2017).
- Incorporation of these requirements enables IDEM to grant compliance schedules under IC 13-14-8-8, and enforce those schedules using State enforcement authorities and processes under IC 13-30. IDEM, Indiana Coal Combustion Residuals Part 256 Solid Waste Management Plan Amendment, at 4 (Feb. 23, 2017).
- This enables Indiana to classify CCR impoundments that are not in compliance with the Federal provisions as open dumps and to use State authorities to enforce these provisions under IC 13-30. IDEM, Indiana Coal Combustion Residuals Part 256 Solid Waste Management Plan Amendment, at 5 (Feb. 23, 2017).
- The modified exclusions and incorporation by reference will eventually be replaced or supplemented to establish a complete set of Indiana regulations for CCR impoundments. IDEM, Indiana Coal Combustion Residuals Part 256 Solid Waste Management Plan Amendment, at 5 (Feb. 23, 2017).